



C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Miguel Paré,

applicant,

and

Communications, Energy and Paperworkers Union
of Canada,

respondent,

and

Câble-Axion Digitel Inc.,

employer.

Board File: 28415-C

Neutral Citation: 2011 CIRB 561

January 5, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Claude Roy, Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members.

Section 16.1 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide the matter without holding an oral hearing.

Parties' Representatives of Record

Mr. Miguel Paré, on his own behalf;

Mr. John Caluori, for the Communications, Energy and Paperworkers Union of Canada;

Mr. Michel Laurent, for Câble-Axion Digital Inc.

These reasons for decision were written by Mr. Claude Roy, Vice-Chairperson.

I–Nature of the Application

[1] On October 7, 2010, Mr. Miguel Paré (the applicant), representing the employees of Câble-Axion Digital Inc. (the employer), filed an application pursuant to section 38 of the *Code* for an order revoking the certification of the Communications, Energy and Paperworkers Union of Canada (the certified bargaining agent or the union) as bargaining agent for the employees of the employer.

II–The Facts

[2] On November 28, 2008, the Board certified the union as bargaining agent for a unit of employees of the employer (order 9580-U). At the time that this revocation application was filed, the bargaining unit covered by the bargaining certificate consisted of the following:

all technicians and dispatch employees working for Câble-Axion Digital Inc., excluding office employees, customer service and support employees and all those automatically excluded by law.

[3] The union and the employer are parties to a collective agreement effective from January 1, 2010, to December 31, 2010. No objections were raised as to the timeliness of this application for revocation and the Board finds that it was filed within the time frame set out in sections 24 and 38(2) of the *Code*.

[4] The application for revocation is dated October 6, 2010. It was signed by the applicant on October 7, 2010, and faxed to the Board at 11:35 a.m. that same day. In the application, the applicant stated the following: “Attached are the documents for each request as well as a copy of the collective

agreement ending December 31, 2010" (translation). However, the material in question was not appended. The fax transmission was only two pages long.

[5] On October 6, 2010, the applicant, who is an employee of the employer and a member of the union, sent the Board the employees' confidential statements dated October 5 and 6, 2010, indicating that they no longer wished to be represented by the union. The Board received the statements, sent by Xpresspost rather than registered mail, on October 7, 2010.

[6] The application for revocation filed by the applicant was not accompanied by confidential statements by the employees authorizing the applicant to act on their behalf. The industrial relations officer handling this file informed the applicant of the defect on the day the application was received, that is, on October 7, 2010.

[7] On October 8, 2010, at 7:41 a.m., the applicant faxed the Board a confidential statement signed by the employees in which they authorized the applicant to "take the necessary steps to have the union's certification revoked" (translation). However, two of the employees who had signed a confidential statement indicating that they no longer wished to be represented by the union did not sign the statement authorizing the applicant to take steps to have the union's certification revoked. Further, all of the signatures on the confidential statement were obtained on October 7, 2010, that is, after the application for revocation had been sent to the Board.

[8] The fax transmission sheet accompanying the confidential statement authorizing the applicant to take the necessary steps toward revocation of the union's certification, faxed to the Board at 7:41 a.m. on October 8, 2010, had the applicant's name as the sender and the word "Mandate" (translation) as the subject. It also had the name, address, and telephone and fax numbers of the employer, Câble-Axion Digitel Inc., and the email address of a representative of the employer.

[9] On October 8, 2010, the Board sent the applicant a letter of instructions regarding the steps to be taken in a revocation matter. It attached two copies of a form to be signed by the applicant to attest to the accuracy of the confidential statements in support of the application. In its letter, the

Board also provided the name of the investigating officer assigned to investigate and verify all documents and statements submitted by the parties to the application for revocation.

[10] On the same day, the Board informed the employer of the application for revocation and sent it a copy thereof, while ensuring the confidentiality of the employees' wishes pursuant to section 35 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). The Board ordered the employer to post the Notice to Employees for a period of seven days and to complete the certificate of posting attached to the Board's letter.

[11] On October 8, 2010, the Board also informed the certified bargaining agent of the application for revocation.

[12] On October 18, 2010, the applicant sent the Board the duly signed and witnessed certificate of accuracy.

[13] On October 21, 2010, the certified bargaining agent advised the Board of its position, as follows:

In response to your letter of October 8, 2010, this is to advise you that we do not intend to submit a response to the application in question given the considerable effort made by the employer and its representatives in relation to the process undertaken by the applicant.

Given that the Board is more than familiar with the employer and its representatives, we rely on the Board's good judgment to assess the employees' wishes.

(translation)

[14] Also on October 21, 2010, the employer sent the Board the certificate of posting indicating that the notice had been posted from October 13 to 21, 2010, in its three facilities.

III—The Law

[15] Section 38 of the *Code* states the following with regard to applications for revocation:

38.(1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.

(2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,

(a) where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time; and

(b) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.

(3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.

(4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit,

(a) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent,

(i) at any time during the first year of the term of that collective agreement, and

(ii) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and

(b) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24.

(5) An application under subsection (1) or (3) must not, except with the consent of the Board, be made in respect of the bargaining agent for employees in a bargaining unit during a strike or lockout of those employees that is not prohibited by this Part.

[16] Section 36 of the *Regulations* sets out the requirements with regard to employees' confidential statements of their wishes:

36.(1) In addition to the information required for an application made under sections 10 and 33, an application made by an employee under section 38 of the *Code* must include a separate and confidential statement, signed by each employee whom the applicant claims to represent, stating that they do not wish to be represented by the bargaining agent and authorizing the applicant to act on their behalf.

(2) The statement described in subsection (1) shall show the printed name, the date on which each employee signed the statement, and that date shall be not more than six months before the date on which the application is filed.

[17] Further, section 39 of the *Regulations* provides as follows with regard to new applications for revocation:

39. Any employee shall not file a new application for revocation of certification in respect of the same bargaining unit until six months have elapsed from the date on which a previous application was rejected.

[18] Section 8 of the *Regulations* indicates what is understood by the date of receipt of an application:

8. The date of filing of an application, response, reply, request to intervene or any other document with the Board is

(a) if the document is sent by registered mail, the date it is mailed; and

(b) in any other case, the date the document is received by the Board.

[19] Section 16(m) of the *Code* sets out the powers of the Board with regard to time limits:

16. The Board has, in relation to any proceeding before it, power

...

(m) to abridge or extend the time for doing any act, filing any document or presenting any evidence in connection with a proceeding.

[20] Finally, section 114 of the *Code* states the following:

114. No proceeding under this Part is invalid by reason only of a defect in form or a technical irregularity.

IV—Analysis and Decision

[21] The applicant, an employee of the employer, filed his application for revocation of the union's certification in accordance with section 38 of the *Code*, respecting the requirement that the applicant be an employee and the authorized timing of the filing.

[22] This application for revocation, dated October 6, 2010, was signed by the applicant on October 7, 2010, and faxed to the Board at 11:35 a.m. that same day. The application is simply a letter that states the following, among other things:

Attached are the documents for each request as well as a copy of the collective agreement ending December 31, 2010.

(translation)

[23] There were no documents attached to the application. The Board stamped the application as received on October 7, 2010.

[24] That same day, the Board received the envelope sent by Xpresspost on October 6, 2010, containing the employees' confidential statements dated October 5 and 6, 2010, attesting that they no longer wished to be represented by the union.

[25] In accordance with section 8(b) of the *Regulations*, the Board deemed the date of receipt of the above documents to be October 7, 2010, rather than October 6, 2010, since they were not sent by registered mail.

[26] Further, the Board noted that the application for revocation filed on October 7, 2010, was accompanied only by the employees' confidential statements indicating that they no longer wished to be represented by the union.

[27] Section 36(1) of the *Regulations* clearly states the following:

36.(1) In addition to the information required for an application made under sections 10 and 33, an application made by an employee under section 38 of the *Code* **must include a separate and confidential statement**, signed by each employee whom the applicant claims to represent, stating that they do not wish to be represented by the bargaining agent and **authorizing the applicant to act on their behalf**.

(emphasis added)

[28] The confidential statements received on October 7, 2010, made no mention of any mandate or authorization for the applicant to file the application for revocation on behalf of the employees. The applicant was informed of the defect that very day.

[29] In *Danielle Ferguson*, 2008 CIRB 427, the Board specified that the applicant had to show authorization by the employees to act on their behalf at the actual time the application for revocation was filed and not at a later date. The Board was clear in this regard:

[15] It is clear that at the time that Ms. Ferguson's section 38 application for revocation was filed on October 3, 2008, she was not the person authorized to file it by the employees whom she claimed to represent. The petitions that Ms. Ferguson filed on October 3 all named Mr. Lee as the authorized representative. At that time, Mr. Lee's application was still pending, as the Board had not yet granted him leave to withdraw it. The applicant's attempt to file new petitions that did authorize her to represent these employees cannot be accepted, because all of the new petitions were signed and dated after the date on which the instant application for revocation was filed. Therefore, Ms. Ferguson's section 38 application is not in compliance with the requirements set out in section 36(1) of the *Regulations*. As she was not the authorized representative of the employees in the bargaining unit at the time that she filed the application, the applicant's revocation application is not properly before the Board and must therefore be rejected.

[30] The Board also indicated that the date a revocation application was filed was the date that had to be considered in determining whether the application had been properly filed in *Robert Bowman*, *Michael J. Rowberry*, *Larry Schmeltz*, 2007 CIRB 380, although in that matter, the issue was whether the signatories of the confidential statements had been employees on the filing date.

[31] On October 7, 2010, after being informed by a Board officer about the defect in the application for revocation in regard to the mandate or authorization to act on behalf of the employees, the applicant had the employees sign an authorization, which was worded as follows:

Magog, October 7, 2010

We, employees of Cable Axion, do hereby mandate Mr. Miguel Paré, also an employee of Cable Axion, to take the necessary steps to have the certification of the Communications, Energy and Paperworkers Union, Local 78, revoked.

(translation)

[32] However, two of the employees who had signed a confidential statement indicating that they no longer wished to be represented by the bargaining agent omitted to sign the confidential statement authorizing the applicant to act on their behalf.

[33] Clearly, the employees signed the confidential statement authorizing the applicant to act on their behalf after the application for revocation had been sent and after it had been received by the Board.

[34] It was not until October 8, 2010, at 7:41 a.m., that the applicant faxed the confidential statement to the Board; moreover, not all of the employees who had indicated that they no longer wished to be represented by the bargaining agent had signed the authorization statement.

[35] This application for revocation is not being rejected by the Board on the ground of interference by the employer, as in *Ken Robinson*, 2003 CIRB 209. However, the Board does consider it odd that the employees' confidential statements authorizing the applicant to act on their behalf were faxed to the Board via the employer's fax machine and that the fax transmission sheet indicating the applicant's name as the sender and "Mandate" as the subject also provided the name and contact information of Câble-Axion Digital Inc. The Board took note of the bargaining agent's position in this regard sent to the Board on October 21, 2010, and reproduced in paragraph 13 above, although it is not the reason for the decision herein.

[36] The Board requires full compliance with section 36(1) of the *Regulations*, which provides that an application for revocation must include a separate and confidential statement, signed by each employee whom the applicant claims to represent, indicating that they do not wish to be represented by the bargaining agent and authorizing the applicant to act on their behalf. Signatures obtained after the date of the filing of the application and authorization statements that do not contain the signatures of all employees who signed the confidential statement indicating that they no longer wish to be represented by the bargaining agent are not acceptable evidence in support of an application for revocation such as the one before the Board.

[37] The Board considers this a substantive defect that renders the application for revocation before the Board invalid. The applicant was not authorized to act on behalf of the employees at the time he

filed the application. Thus, what is involved here is not a defect in form or a technical irregularity provided for under section 114 of the *Code*. Further, the Board is of the view that the specific nature of the requirement regarding authorization to act on behalf of employees set out in section 36(1) of the *Regulations* prevents it from exercising its discretion to permit the amendment of the application pursuant to section 16(m) of the *Code*.

[38] As was the case in *Danielle Ferguson, supra*, the applicant was not the authorized representative of the employees in the bargaining unit at the time that he filed the application for revocation and, so, the application is not properly before the Board.

[39] In *Mike Schembri et al.* (1998), 106 di 68; 40 CLRBR (2d) 257; and 98 CLLC 220-040 (CLRB no. 1221), the applicant had not provided the date on which each employee had signed the petition in support of the application for revocation. The Board ruled that this was a defect in form provided for under section 114 of the *Code*, since a hearing had served to establish the date on which each of the signatories had signed and to show that the signatures were not stale dated.

[40] In this matter, however, the Board is unable to use its discretion under section 114 of the *Code* because, according to the investigation report of the industrial relations officer assigned the file, the confidential statement authorizing the applicant to act on behalf of employees was not signed by some of the employees and was sent to the Board after the date the application for revocation was filed. The mandate given to the applicant by the employees indicated that the applicant was authorized "to take the necessary steps to have the union's certification revoked." In the *Dictionnaire canadien des relations du travail*, 2nd ed., Québec, Presses de l'Université Laval, 1986, Gérard Dion defines a mandate as a "commission or document giving a person authorization to do something in someone else's name" (translation). As mentioned earlier, the applicant must have authorization to act at the time the application for revocation is filed.

V—Conclusion

[41] The application for revocation is accordingly dismissed.

[42] Further, given the confidential statements signed by the majority of the employees with respect to their wish to no longer be represented by the bargaining agent and the confidential statement signed by some of them authorizing the applicant to file an application for revocation on their behalf, the provision in section 39 of the *Regulations* to the effect that a bargaining unit may not file a new application for revocation for six months applies to the bargaining unit in question here.

[43] This is a unanimous decision of the Board.

Claude Roy
Vice-Chairperson

Daniel Charbonneau
Member

Patrick J. Heinke
Member